Supreme Court, U.S.
FILED
DEC 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,
Petitioner,

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

DANIEL H. MUNDT
MUNDT & ASSOCIATES
715 West Superior Street
Duluth, Minnesota 55802
(218) 722-3665

Attorney for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement	1
Legal Issues	2
1. Rule 49(a) assumes findings in accordance with the special verdict on omitted issues and therefore the judgment is deemed to include a finding of fraud	2
2. Rule 49(a) directs that the issue of fraud be resolved in favor of petitioner	4
3. Petitioner is not asking this Court to review questions of fact	5
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958)	6
Dick v. New York Life Insurance Company, 359 U.S. 437 (1959)	6
Guidry v. Kem Manufacturing Company, 598 F.2d 402, *rehearing denied,* 604 F.2d 320 (5th Cir. 1979), *cert. denied,* 445 U.S. 929 (1980)	2, 3
Hinshaw v. New England Mutual Life Insurance Company, 104 F.2d 45 (8th Cir. 1939), *cert. denied,* 308 U.S. 583 (1939)	3, 4

Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959) 6

Molex, Inc. v. Nolen, 759 F.2d 474 (5th Cir. 1985) 3

Murphy v. County House, Inc., 240 N.W.2d 507 (Minn. 1976) 5

Federal Rules of Civil Procedure:

Fed. R. Civ. P. Rule 49(a) 3

No. 85-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,
Petitioner,

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Minnesota Timber Producers Association, Inc. (the Association) submits herein its reply to respondent American Mutual's Brief in Opposition.

STATEMENT

The Association's petition involves a substantial federal procedural question. Its petition should be granted for the following reasons:

1. The Eighth Circuit Court's application of Rule 49(a) is in direct conflict with the Fifth Circuit application of Rule 49(a); and

2. If left to stand, the Eighth Circuit opinion will effectively nullify and emasculate Rule 49(a).

Respondent American Mutual Insurance Company of Boston (American Mutual) attempts to blur the legal questions contained in the Association's petition. The extended, inaccurate and extraneous factual statements concerning the operation of the Minnesota Timber Producers Association-American Mutual Worker's Compensation Safety Group Plan are nothing more than "red herrings."

No unresolved factual issues exist. All relevant issues of fact were determined by the jury. The questions petitioner seeks to have reviewed by this Court are whether the Eighth Circuit Court of Appeals violated Rule 49(a) of the Federal Rules of Civil Procedure and the petitioner's Seventh Amendment right to a jury trial by reversing certain portions of the trial court's judgment.

LEGAL ISSUES

1. Rule 49(a) Assumes Findings In Accordance With The Special Verdict On Omitted Issues And Therefore The Judgment Is Deemed To Include A Finding Of Fraud.

The Association has never, and does not now, agree with the Court of Appeal's determinations that the issue of fraud was not submitted to the jury and that no fiduciary relationship existed between the parties as a matter of law. Assuming the Court of Appeals is correct in holding that the fraud issue was never submitted, it has clearly erred by ignoring the plain language of Rule 49(a) that such a finding is *deemed* to have been made by the trial court. See *Guidry v. Kem Manufactur-*

ing Company, 598 F.2d 402, 406, *reh'ing denied* 604 F.2d 320, (5th Cir. 1979), *cert. denied,* 445 U.S. 929.

In *Guidry,* the Fifth Circuit held:

> The rule itself provides insurance against one hazard: the necessity that the jury decide every element of recovery or defense lest the verdict remain incomplete and indecisive. If counsel do not timely request that an issue be submitted to the jury, it may be resolved by the court. *If the Court fails to make a finding, "it shall be deemed to have made a finding in accord with the judgment on the special verdict."* F.R.Civ.P. 49(a). *Guidry v. Kem Manufacturing Company,* 598 F.2d at 406 (emphasis added). Cf. Court of Appeals decision herein (Appendix A of Petitioner's Petition at p. A-6 and p. A-12)

American Mutual totally misstates Rule 49(a) of the Federal Rules of Civil Procedure when it pronounces that "MTPA failed to comply with the Rule's requirements that all necessary issues be submitted to the jury or they are waived." (Br. in Opp. at p. 13). This is a misleading statement of Rule 49(a) and is obviously not consistent with the language or intent of the Rule. Cf. *Molex, Inc. v. Nolen,* 759 F.2d 474, 478 (5th Cir. 1985) (rule is unambiguous and the court has given its words their plain meaning).

Rule 49(a) provides that when an issue is not specifically submitted to the jury, the trial court may make a finding and if it does not, a finding shall be deemed to have been made in accordance with judgment on the special verdict. *Fed. R. Civ. P.* 49(a). See *Hinshaw v. New England Mutual Life Insurance Company,* 104 F.2d 45, 48-49 (8th Cir. 1939) (where trial court made no finding but entered judgment for plaintiff, court of appeals assumes a finding in accordance with the judgment).

Even assuming the fraud issue was not submitted to the jury, under Rule 49(a) it is presumed that the trial court passed on the

issue in accordance with the judgment. Therefore to justify reversing the trial court's judgment requires an analysis whether the trial court's determination was clearly erroneous. The Court of Appeals' decision is completely devoid of any such analysis.

The Court of Appeals erroneously believed that its duty was fulfilled once it had determined that the issue of fraud was not submitted to the jury. (See A-6). Reversing that part of the trial court's judgment founded on fraud solely on the basis that the issue was not submitted to the jury contravenes Rule 49(a)[1] and abrogates the Eighth Circuit's prior correct decisions on Rule 49(a). See *Hinshaw*, 104 F.2d at 48-49. More seriously, the decision directly, and embarrassingly, conflicts with the correct interpretation of Rule 49(a) by the Fifth Circuit.

2. Rule 49(a) Directs That The Issue Of Fraud Be Resolved In Favor Of Petitioner.

Respondent makes the incredible argument that if the Association had not objected to Respondent's special verdict form, the Association would have successfully submitted the issue of fraud to the jury. (Br. in Opp. p. 19) Respondent's argument is that since the Association objected to American Mutual's proposed special verdict form, the issue of Mr. Penn's misrepresentations was not submitted to the jury and the Association should not now be heard to complain. (*Id.*)[2]

---

[1] Petitioner brought this patent error concerning rule 49(a) to the Court of Appeals' attention in its Petition for Rehearing. Petitioner's plea, however, fell on deaf ears. See Appendix C of Petitioner's Petition at A-16.

[2] American Mutual's confused argument pertaining to Rule 49(a) only reaffirms petitioner's suggestion that direction by this Court is needed concerning Rule 49(a).

Petitioner has demonstrated that the fraud issue was submitted to the jury. (See Petition for Writ of Certiorari pp. 16-19) American Mutual attempts to cloud this fact.

Even assuming that American Mutual is correct on the submission issue, Rule 49(a) directs a finding of fraud in accordance with the judgment. As such the judgment is not subject to summary reversal by the Court of Appeals, as was done here. Rather some analysis or reasoning other than simply stating the issue was not submitted to the jury is clearly required. For this reason, the Court of Appeals' determination that the issue was not submitted the jury and therefore not determined by the trial court is a gross error which should be corrected by this Court.

3. Petitioner Is Not Asking This Court To Review Questions Of Fact.

The Association's petition requests review by this Court of the manner and method by which the Court of Appeals reached its erroneous conclusions.[3] This request raises a substantial federal question. The Association does not seek review simply because the Court of Appeals' decision misconstrues the facts and erroneously applies Minnesota law.

The Association is not asking this Court, as suggested by respondent, to reassess each piece of evidence to determine whether a fiduciary relationship based on Minnesota law existed between the parties. (Br. in Opp. p. 14)

The Eighth Circuit Court of Appeals found as a matter of law that no fiduciary relationship existed between American Mutual and the Association. Yet, the existence of such a relationship is a question of fact in Minnesota. *Murphy v. County House, Inc.*, 240 N.W.2d 507 (Minn. 1976).

---

[3] In addition to the fraud issue, the Court of Appeals also erred on the contract termination issue for basically the same reasons.

This case may entail a limited review by this Court of certain evidence, or lack thereof, submitted in this case. The mere fact, however, that such a limited collateral review may be necessary to determine whether the Court of Appeals has erred in certain legal rulings is not something new to this Court. See, e.g., *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959); *Dick v. New York Life Insurance Company*, 359 U.S. 437 (1959); *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958).

To allow the appellate courts to give Rule 49(a) the effect suggested by American Mutual will abrogate the intent of the Rule and deny parties the protection of the Seventh Amendment while adding to the congestion of the courts. The question to be asked is what purposes do Rule 49(a) or the Seventh Amendment serve if an appellate court can, with impunity, circumvent and violate the procedure contained in Rule 49(a) and the rights provided by the Seventh Amendment?

CONCLUSION

Obviously any special verdict form will leave many factual details directly unanswered. Because of these unanswered questions, Rule 49(a) requires that these questions be resolved in favor of the prevailing party at trial by drawing logical inferences from the jury's answers and making certain assumptions based on the trial court's judgment. The Court of Appeals' summary reversal of portions of the trial court's judgment ignores the clear mandate of Rule 49(a) and directly conflicts with decisions of other circuit courts of appeal. The Association's petition raises this important question of federal procedural law.

Moreover, for the Court of Appeals to step in and reweigh the evidence considered by the jury and substitute its judgment for that of the trier of fact exceeds the Court of Appeals' constitutional authority and impinges on the Association's Seventh

Amendment right to trial by jury. For these reasons, Petitioner respectfully renews its request that its Petition for a Writ of Certiorari be granted.

Dated: December, 1985

Respectfully submitted,

Daniel H. Mundt
MUNDT & ASSOCIATES
715 West Superior St.
Duluth, MN 55802
Telephone: (218) 722-3665

Attorney for Petitioner